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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1994,

JOHN W. SHOEMAKER, et al.,
Petitioners,

v.

GLENN S. KELLOGG, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT BELOW SHOULD RECONSIDER ITS EX POST FACTO RULING DECIDED PRIOR TO THIS COURT'S DECISION IN *CALIFORNIA V. MORALES* ___ U.S. ___, 115 S.CT. 1597 (1995).

II. WHETHER THE EX POST FACTO CLAUSE, AS INTERPRETED IN *CALIFORNIA V. MORALES, SUPRA*, PERMITS STATES TO AMEND REGULATIONS GOVERNING THE PROCEDURES UNDER WHICH PAROLE MAY BE REVOKED AND APPLY THOSE AMENDMENTS TO PREVIOUSLY SENTENCED INMATES WHO HAVE COMMITTED A NEW CRIME WHILE ON PAROLE.

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LANI R. SMITH;
LAWRENCE DESSENBERG;
JOHN STAMPER;
MICHAEL JONES;
ROBERT DONLEY;
DANIEL SCHREIBER;
MICHAEL KARHOFF,

Respondents.

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OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed on January 9, 1995, in Case No. 93-4287, is reported as *Kellogg v. Shoemaker*, 46 F. 3d 503 (6th Cir. 1995), and is reproduced at A-1.

The Order of the United States District Court for the Southern District of Ohio, Eastern Division, filed on March 22, 1995, enjoining Petitioners from applying Ohio Administrative Code Section 5120:1-1-21 to members of the class who committed initial offenses prior to September 1, 1992, is reproduced at A-14.

The Order and Opinion of the United States District Court for the Southern District of Ohio, Eastern Division, filed on October 22, 1993, denying Respondents' Motion to Alter or Amend Judgment, is reproduced at A-16.

The Order and Opinion of the United States District Court for the Southern District of Ohio, Eastern Division, filed on May 27, 1993, entering summary judgment for Petitioners is reproduced at A-21.

The Order of the United States District Court for the Southern District of Ohio, Eastern Division, filed on December 9, 1992, granting summary judgment against named Respondents Glenn S. Kellogg, Lani R. Smith and John Stamper, is reproduced at A-35.

The Order of the United States Court of Appeals for the Sixth Circuit, filed on February 28, 1995, denying Petitions for Rehearing, is reproduced at A-39.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 9, 1995. (A-1). Timely petitions for rehearing were denied on February 28, 1995, and this petition is timely filed. Sup. Ct. R. 13. Jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Art. I, Section 10

No State shall ... pass any ... ex post facto Law ...

STATEMENT OF THE CASE

On August 15, 1990, inmate Glenn Kellogg brought suit against Ohio parole authorities under 42 U.S.C. Section 1983, alleging that Ohio's parole revocation procedures violated his rights. Subsequently, the District Court certified the case as a class action, to include "all persons whose parole was, or will be, revoked by the Ohio Adult Parole Authority through a so-called parole-violator recommissioned hearing because they have been convicted of a new felony committed while on parole." Kellogg and other named inmates maintained that the hearings provided by State parole authorities to parole violators recommissioned (PVRs), e.g., inmates whose paroles were revoked because they were convicted of a felony committed while on parole, failed to satisfy constitutional due process standards. The inmates sought a declaratory judgment and injunctive relief.[1]

Effective November 29, 1992, Ohio parole authorities promulgated Ohio Administrative Code Section 5120:1-1-21, which provided that parole authorities shall revoke the release of any parolee who is recommitted based on conviction for an offense committed while on parole.[2] In effect, the regulatory change provided that revocation hearings would no longer be afforded to PVRs. Based on the latter administrative change, on May 28, 1993, the District Court dismissed the class action as moot. (A-21). In its opinion and order, the District Court noted that the action

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[1] On December 8, 1992, the District Court granted summary judgment in favor of the parole authorities against named plaintiffs Kellogg, Smith and Stamper, on the ground that unsuccessful mandamus actions by these inmates in state court barred them, under the doctrine of res judicata, from seeking relief in federal court.

[2] The Sixth Circuit subsequently determined the effective date of the new regulation to be September 1, 1992.

sought only declaratory and future injunctive relief, and that the inmates did not, and could not, challenge the lawfulness of the current confinement of a member of the class, because such an attack is properly brought only in the context of a habeas corpus action under 28 U.S.C Section 2241.

The inmates then moved to alter or amend the judgment, arguing, *inter alia*, that application of the new administrative rule to inmates initially convicted prior to the effective date of the new regulation violated the constitutional prohibition against *ex post facto* laws. In denying the motion to alter or amend, the District Court, in its order and opinion of October 22, 1993, found that the new regulation had not been applied to remedy any defect in the revocation procedures followed in the past. Accordingly, the District Court rejected the inmates' *ex post facto* claim. (A-16)

The inmates appealed. On January 9, 1995, the Sixth Circuit Court of Appeals sustained the District Court's mootness determination with respect to the inmates' challenge to the adequacy of parole revocation hearings under procedures effective prior to September 1, 1992. However, the Sixth Circuit also held that with respect to some of the inmates, the new regulation could be impermissible under the *ex post facto* clause. The Sixth Circuit found specifically that because the new regulation eliminated a "substantial right" to discretionary consideration for continued parole, it constituted an impermissible *ex post facto* law with respect to inmates whose initial offense occurred before September 1, 1992, the effective date of the new regulation. (A-12)

Notwithstanding the above, the Sixth Circuit, in the concluding paragraph of its opinion, appeared to limit the *ex post facto* holding only to those inmates whose subsequent conviction predated the effective date of the new rule.

Accordingly, it sustained the District Court "in all respects, except as to those prisoners, if any, who committed initial offenses *and also a parole violation offense conviction* prior to September 1, 1992, but whose parole revocation procedures will be governed by the new regulations." (A-13) It then remanded the case for the District Court "to provide prospective injunctive relief as to those limited members of the plaintiff class described in this opinion." (A-13)

On January 23, 1995, Ohio parole authorities petitioned for a rehearing, on the basis that the Sixth Circuit's opinion was unclear as to the class of inmates for which application of the new procedure would be enjoined on *ex post facto* grounds. On or about January 19, 1995, the inmates separately petitioned for rehearing. On February 28, 1995, the Sixth Circuit denied both petitions for rehearing.[3] While acknowledging an "inconsistency" in its opinion, the Sixth Circuit declined to elaborate further on its *ex post facto* analysis, but instead ordered that the opinion's references to "parole offense conviction[s] prior to September 1, 1992" be stricken. (A-40)

On March 22, 1995, the District Court entered final judgment consistent with the Sixth Circuit's mandate. The District Court's order provided specifically that application of Ohio Administrative Code Section 5120:1-1-21, to members of the plaintiff class who committed initial offenses prior to the effective date of the regulation, September 1, 1992, but whose parole revocation procedures are conducted after September 1, 1992, constitutes an *ex post facto* law, and its application to such persons is enjoined. The District Court's order further provided that those class members who committed their initial crime before September 1, 1992, but

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[3]The Sixth Circuit's denial of the petitions for rehearing occurred before this Court's decision in *Morales, supra*.

whose parole revocation proceedings are conducted after September 1, 1992, "are entitled to the procedural safeguard outlined in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Moss v. Patterson*, 555 F. 2d 137 (6th Cir.), *cert. denied, sub nom. Kette v. Moss*, 434 U.S. 873 (1977)," e.g. the mitigation hearing permitted under the prior parole revocation procedure. (A-15)

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

Petitioners submit that the writ of certiorari should be granted in this case, because the Sixth Circuit's decision -- that the *ex post facto* clause prohibited the change in parole revocation procedures solely on the ground of an alleged "substantial disadvantage" to the inmates -- is patently contrary to this Court's fundamental view of the application of the clause, as reaffirmed in the Court's recent decision of *California Department of Corrections et al. v. Morales*, __ U.S. __, 115 S.Ct. 1597 (1995). Accordingly, Petitioner asks that the Court grant certiorari, vacate the Sixth Circuit's judgment, and remand the case for reconsideration in light of *Morales*. In the alternative, Petitioner asks the Court to grant certiorari and to review the case, on the basis that the change in question does not increase in any sense the inmates' punishment for their initial offenses. Thus, *Morales* requires a conclusion that the Sixth Circuit erred in applying the *ex post facto* clause.

I. THE SIXTH CIRCUIT'S DECISION IS IN PATENT CONFLICT WITH THIS COURT'S FUNDAMENTAL VIEW OF THE APPLICATION OF THE EX POST FACTO CLAUSE, AS REAFFIRMED IN THE COURT'S RECENT DECISION OF *CALIFORNIA DEPARTMENT OF CORRECTIONS V. MORALES*, ___ U.S. ____, 115 S. Ct. 1597 (1995)

As early as *Warden v. Marrero,* 417 U.S. 653 (1974), this Court suggested that a change in parole eligibility could raise *ex post facto* concerns if the net result is an increased term of actual imprisonment. In the wake of *Marrero*, cases applying the *ex post facto* clause to such post-conviction proceedings as parole eligibility and "good time" credit reflected generally two distinct views with respect to the scope of the clause's protection as expressed in the Court's decisions. An historical and more limited view focused on the clause's basic protection against arbitrary, retrospective increases in a prisoner's punishment. *See Miller v. Florida*, 482 U.S. 423 (1987); *Roller v. Cavanaugh*, 984 F.2d 120, 122 (4th Cir. 1993). A second view, based primarily on specific language in *Warden v. Marrero, supra,* and *Lindsey v. Washington*, 301 U.S. 397 (1937), favored a more expansive scope of protection, to the effect that the *ex post facto* clause forbade legislation that operates to the "substantial disadvantage" of prisoners, whether or not the legislation is "technically an increase in the punishment annexed to the crime." *Lindsey v. Washington, supra,* at 401-402; *Rodriquez v. U.S. Parole Comm'n*, 594 F. 2d 170, 176 (7th Cir. 1979).

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court suggested that the focus of the *ex post facto* clause remains on the specific protection against retrospective

conviction and punishment, as opposed to a general prohibition on infringement of "substantial rights." On April 25, 1995, the Court decided *California Department of Corrections, et al. v. Morales,* ___ U.S. ___, 115 S. Ct. 1597 (1995), wherein the Court held that the *ex post facto* clause did not preclude retrospective application of the statutory changes in question. In so holding, the Court reaffirmed its rationale in *Collins, supra,* and disapproved specifically the language in *Lindsey, supra,* which suggested a more expanded view of the clause.

The California statute in question had entitled Morales to an annual parole suitability hearing, but was amended ten years after Morales' conviction to permit parole authorities to defer the hearing for up to three years under specified circumstances. Morales contended that parole eligibility is annexed to the punishment for the underlying offense and accordingly, under *Lindsey v. Washington, supra, Weaver v. Graham*, 450 U.S. 24 (1981), and *Miller v. Florida*, 482 U.S. 423 (1987), retrospective change to the parole suitability statute violated the *ex post facto* clause. Alternatively, Morales argued that if the statutory change could not be deemed to have affected his punishment, the *ex post facto* clause nevertheless forbade any legislative change that has any conceivable risk of affecting a prisoner's punishment.

Rejecting Morales' first argument out of hand, the Court held that the statutory change had nothing to do with the definition of Morales' crime nor did it alter the formula under which Morales' sentence was calculated, and thus, under *Collins*, the *ex post facto* clause was not implicated. The Court then noted:

> After Collins, the focus of the ex post facto inquiry is not on whether a legislative change

> produces some ambiguous sort of "disadvantage," *nor, as the dissent seems to suggest, on whether amendment affects a prisoner's "opportunity to take advantage of provisions for early release,"* see post, at 5, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punished. [Emphasis added].

Morales, supra, at note 3. Accordingly, the Court discredited totally the premise that a change in parole eligibility rules, by virtue of a possible effect upon the prisoner's opportunity for early release, should be equated ipso facto with a retrospective increase in punishment prohibited by the *ex post facto* clause.

In other words, the *ex post facto* clause does *not* exclusively focus on determining whether there has been a change in the conditions existing at the time of the inmates' initial offense, but rather on whether such change has actually increased the punishment for the initial offense. In contrast, the Sixth Circuit in this case focused exclusively on a perceived change in conditions, without considering whether the change had an impact on the sentence.

But more importantly, in rejecting Morales' second argument, the Court stated that the risk of affecting a prisoner's punishment posed by a legislative change in the frequency of parole hearings, even a change that totally eliminates a possible hearing, is not determinative in applying the *ex post facto* clause:

> The dissent proposes a line between those measures that deprive prisoners of a parole hearing and those that "make it more difficult

> for prisoners to obtain release." Post, at 12 - 13. But this arbitrary line has absolutely no basis in the Constitution. *If a delay in parole hearings raises ex post facto concerns, it is because that delay effectively increases a prisoner's term of confinement, and not because the hearing itself has independent constitutional significance. Other adjustments to mechanisms surrounding the sentencing process should be evaluated under the same standard.* [Emphasis added].

Morales, supra, at note four.

In short, this Court in *Morales* reaffirmed categorically the Court's rejection in *Collins* of the expanded view of the clause's protection; accordingly, the elimination of a parole hearing, even if to the "substantial disadvantage" of the prisoner, is not in and of itself a violation of the *ex post facto* clause.

In the case at hand, the Sixth Circuit's resolution of the inmates' *ex post facto* claim hinged upon two basic conclusions: first, like parole eligibility, for the purposes of *ex post facto* analysis, the change in parole revocation procedures must be considered "retrospective" insofar as it occurred after the time of the inmates' initial offenses; and second, elimination of the mitigation hearing could not be done "retrospectively" because it would amount to a "substantial disadvantage" prohibited by the *ex post facto* clause.

In reaching the first conclusion, the Sixth Circuit reasoned, based on *Rodriquez v. United States Parole Comm'n*, *supra*, that the *ex post facto* clause required absolutely a focus on the time of the inmate's initial offense,

as opposed to the time of the commission of the parole violation, e.g., conviction for an offense committed while on parole. " ('[A]lthough parole eligibility is determined as of the date of sentencing for some purposes ... the ex post facto clause looks to the punishment annexed at the time the crime was committed.')" (A-11). Thus the Sixth Circuit found that the change in parole revocation procedures in question must be deemed to have "retrospective" effect with respect to all inmates whose initial offenses were committed prior to the effective date of the change. The Sixth Circuit then concluded that with respect to inmates who committed their initial offenses prior to the effective date of the regulatory change, the new regulation violated the *ex post facto* clause because it did away with the previously available mitigation hearing, and thereby deprived the inmates of a "substantial right" to discretionary consideration for continued parole (A-12).

Petitioners submit that the Sixth Circuit's reasoning is part and parcel of the expanded view of the clause's protection which this Court has definitively rejected. As the Court made clear in *Morales*, a change in parole eligibility rules cannot be considered ipso facto to effect an increase in punishment for the purposes of the *ex post facto* clause; accordingly, the Sixth Circuit's reliance on *Rodriguez* in focusing on the time of the inmate's initial offense was erroneous. Moreover, it can now be stated unequivocally, based on *Morales*, that elimination of the inmate's mitigation hearing has absolutely no constitutional significance in and of itself, even if it amounts to a "substantial disadvantage" to the parolee. Of course, it was the elimination of this hearing which the Sixth Circuit found to be a "substantial disadvantage" precluded by the *ex post facto* clause.

Thus Petitioners submit that the Sixth Circuit's reasoning in deciding the *ex post facto* issue against the state

is in patent conflict with this Court's fundamental view of the application of the clause, as set forth in *Collins* and reaffirmed in *Morales*. Accordingly, the Court should grant certiorari, vacate the Sixth Circuit's judgment, and remand the case for reconsideration in light of *Morales*.

II. THE SIXTH CIRCUIT ERRED IN APPLYING THE EX POST FACTO CLAUSE BECAUSE THE REGULATORY CHANGE DID NOT INCREASE THE INMATES' PUNISHMENT.

The Sixth Circuit focused exclusively on the alleged "substantial disadvantage" to the inmates, and did not address the fundamental question of whether the change in parole revocation rules resulted in an increase in punishment for the inmates' initial offenses. Petitioners submit that the change does not increase in any sense the inmates' punishment; accordingly, *Morales* requires a conclusion that the Sixth Circuit erred.

In determining that the statutory amendment in *Morales* did not offend the *ex post facto* clause, the Court noted several important circumstances which indicated a procedural as opposed to substantive purpose. The evident focus of the amendment was to relieve the parole board of the burdens associated with scheduling hearings for prisoners who were not likely to obtain parole. In fact, the substantive standards for granting parole remained the same. Moreover, the Court declared that "countless changes [which] might create some speculated, attenuated risk of affecting a prisoner's actual term of confinement" could not be considered determinative for the purposes of the *ex post facto* clause.

Petitioners submit that the regulatory change involved in this case is also procedural, and has even less to do with actual punishment than the statutory amendment in *Morales*. Here there is simply no retrospective increase in punishment involved. Unlike parole eligibility rules, a change in parole revocation procedures cannot in any way increase the amount of time an inmate must serve before obtaining release on parole. In fact, in this case the court below purports to bar application of the new procedure to inmates who have already been paroled and who have forfeited that parole by a new conviction. Also, the change in the rule does not, in and of itself, have any retrospective effect on the an inmate's initial sentence. Rather, it is the prisoner's subsequent conviction for an offense committed while on parole which occasions the parolee's return to prison. Moreover, the substantive standards for determining whether parole should be revoked were not altered by the rule change. Indeed, even under the old rule, inmates who were convicted of crimes committed while on parole were conclusively presumed to be parole violators.[4] In sum, the change involved here is indeed procedural, and does not involve a purpose to effect or increase the inmates' actual incarceration for their initial offenses.

More importantly, the rule's elimination of a mitigation hearing for the inmates, while foreclosing the opportunity for immediate continuation on parole, nevertheless has only the most speculative and attenuated possible effect on the inmates' actual terms of confinement. It cannot be said that at the time of the inmates' initial convictions, the calculation of the length of sentence is

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[4]Respondents argued from the outset that the PVR revocation process under the old rule resulted in the revocation of parole in every case in which the PVR was found to have been convicted of a felony while on parole.

dependent upon an expectation of a discretionary parole revocation hearing at some future date. To argue otherwise is to suggest that at the time of sentencing, prisoners anticipate that they will achieve parole, commit other offenses while on parole, but nevertheless be able to convince the parole authorities at a discretionary hearing to continue them on parole. Further, revocation of the inmates' parole cannot in and of itself be considered an *increase* in the inmates' actual confinement, insofar as they have enjoyed a previous release on parole, and were on notice, prior to the commission of their parole violations, that felony convictions would result in revocation without a mitigation hearing.

In sum, the Sixth Circuit's holding in this case cannot be sustained on the merits in light of *Morales*. Petitioners therefore ask in the alternative that a writ of certiorari to review the case be granted.

CONCLUSION

For all the foregoing reasons, Petitioners submit that a writ of certiorari should therefore be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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May 30, 1995

No. 93-4287

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENN S. KELLOGG; Lani R. Smith; Lawrence Dessenberg; John Stamper; Michael Jones; Robert Donley; Daniel Schreiber; and Michael Karhoff, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

JOHN W. SHOEMAKER, et al.,
Defendants-Appellees

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed January 9, 1995

Before: Keith, Wellford, and Daughtrey, Circuit Judges. Harry W. Wellford, Circuit Judge. Glenn S. Kellogg ("Kellogg"), an Ohio prison inmate, initiated a 42 U.S.C. § 1983 class action suite in 1990 seeking declaratory and injunctive relief with respect to certain Ohio parole revocation procedures.

This case began in federal court in August 1990, when Kellogg[5] filed a pro se complaint alleging, under 42 U.S.C. § 1983, that the Ohio Parole Revocation procedures violated his procedural due process rights. The Ohio public defender, who began representing Kellogg, moved to certify a class to challenge certain parole revocation procedures. The district court certified the class to include "all persons who parole was, or will be, revoked by the Ohio Adult Parole Authority through a so-called parole violator recommissioned hearing because they have been convicted of a new felony committed while on parole."

The provisions of Ohio law now under attack are the new "emergency" provisions that the Ohio Adult Parole Authority ("agency") enacted effective September 1, 1992. Originally, the class brought its action against the older repealed provisions, which were discretionary and would have required Ohio to provide parolees with a "meaningful" hearing prior to revoking their parole.[6] Under these old regulations, a parolee convicted of a subsequent crime in Ohio, while on parole, was conclusively presumed to be in violation of his parole. The parolee under the old regulations, however, was entitled to a hearing to present any relevant mitigating circumstances. Although plaintiff parolees seem to concede they were given a "hearing" under the old regulations, they argued that it did not meet the procedural requirements that *Morrisey v. Brewer*, 408 U.S.

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[5]Kellogg's probation had been revoked after he was convicted of new felonies (Attempted Grand Theft, Possession of Criminal Tools, Breaking and Entering, and Drug Abuse with prior drug law (conviction) while on parole.

[6]Section 5120:1-1-19(1) provided: "In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 has been violated."

471 (1972), required. The district court agreed with their argument, holding that the parolees did not receive sufficient notice, were denied the assistance of counsel, and were not permitted to call or to subpoena witnesses.

The agency then repealed the old regulations and implemented new ones. The new regulations did away with any type hearing if the defendant was convicted by an Ohio court "for an offense he committed while on any release granted by the Adult Parole Authority..." There would no longer be a hearing to determine mitigating circumstances surrounding the revocation. The only process the parolees would receive would be the parole authority's verification "that the sentence was imposed for an offense that occurred while the prisoner was under release status."

The agency revised the parole procedures to eliminate any agency's discretion in deciding whether to revoke parole. *See Black v. Romano*, 471 U.S. 606, 105 S. Ct. 2254 (1985), which had indicated that the hearing procedures required in *Morrisey* were applicable only if the parole board exercised discretion in revoking parole. *See also Snead v. Donahue*, 993 F.2d 1239 (6th Cir. 1993); *Harrison v. Parke*, 1990 WL 170428 (6th Cir.).

The district court then granted summary judgment in favor of the agency, sustaining its reliance on the amended regulation. The district court held that the new policy rendered the plaintiffs' challenges moot. The district court refused to amend its judgment and refused to grant plaintiffs any relief. The district court discussed rejecting the merits of the plaintiffs' constitutional challenges to the new regulations.

Plaintiffs appeal in order to challenge the district court's holding that the change in the parole procedures

rendered the plaintiffs' constitutional challenges moot. Plaintiffs contend that the agency violated its rule-making powers by adopting the new procedures. Plaintiffs also argue that this court should reconsider *Sneed v. Donahue*, which held that a parole board was not required to provide the parolee with a hearing if the board exercised no discretion in revoking parole. Last, they wish to challenge the constitutionality of the new regulations, arguing that the change of the parole procedures in this respect constitutes a violation of the *ex post facto* clause.

I.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 since there is an appeal from a final order of the district court. The appropriate standard of review is *de novo* because the appeal concerns issues of law.

II.

MOOTNESS

There is some confusion as to whether the district court held that the plaintiffs' constitutional challenges to the *new* procedures were moot. The district court discussed the constitutional merits of the plaintiffs' arguments, but refused to amend the court's judgment dismissing the claims of plaintiffs:

> Plaintiffs now seek to amend this Court's judgment, arguing that the application of OAC § 5120:1-1-21 to members of the plaintiff class whose parole had been revoked under

> the old regulation violates the constitutional prohibition against *ex post facto* laws...As this court ruled in its *Opinion and Order* entered May 27, 1993, the relevant analysis turns to whether or not plaintiffs' claims for relief are moot. Plaintiffs' sole claim for injunctive relief sought to restrain defendants from violating plaintiffs' procedural due process rights in the future through the use of constitutionally infirm PVR hearing or procedures. Plaintiffs no longer have any procedural due process rights to a meaningful hearing in connection with felonies committed after the effective date of the new regulation. Accordingly, the enactment of OAC § 120:1-1-21 has rendered plaintiffs' claims for future injunctive relief moot.

The plaintiffs do not contest the mootness of their challenges to the original procedures.[7] Plaintiffs argue, however, that they should be allowed to challenge the constitutionality of the new parole procedures.

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[7]It is apparent that the changes in the parole procedure rendered the plaintiffs' challenges to the original procedures moot. There is no need for this court to issue an injunction when the parole board has voluntarily changed its allegedly unconstitutional practices. *See Cotton v. Mansour*, 863 F.2d 1241, 1244-45 (6th Cir. 1988), *cert. denied*, 493 U.S. 1042 (1990)(refusing to enjoin a social service agency's calculation of food stamp eligibility after the agency changed its practice to comply with federal regulations because "[t]here was simply no ongoing violation...to enjoin"). *See also* Corey C. Watson, Comment, *Mootness and the Constitution*, 86 Nw. U.L.Rev. 143, 147 (1991). Any remedy that a member of the class has for the unconstitutional application of the old parole procedures must, in the future, be obtained through habeas corpus.

We note that considerable controversy surrounds the mootness doctrine after *Honig v. Doe*, 484 U.S. 305 (1988). One rationale holds that the mootness doctrine is fundamentally tied to the case and controversy language of Article III, and, therefore, the court may only review if there is a justiciable issue. Another view is that the mootness doctrine is more flexible, and may be used to accomplish prudential concerns to avoid the squandering of judicial resources after the decisional process is underway. *See* Corey C. Watson, *Mootness and the Constitution*, 86 Nw U.L. Rev. at 143.

Under either rationale, the plaintiffs' challenge to the new procedures are not moot. The parole authority may not be allowed to abort or delay constitutional review of the parole procedures by substitution of a new procedure on the eve of adjudication. Prudential concerns also require us to hear this case rather than to dismiss it as moot as to those plaintiffs who are alleged to have committed offenses and had their paroles revoked prior to September 1, 1992. We conclude that a "case or controversy" exists, and that plaintiffs have raised proper concerns about the regulations' constitutionality as applied to offenses which occurred prior to the date of the amendment.

III.

DISCUSSION

A. Whether the agency violated its rule-making authority by adopting the new parole revocation procedures?

The plaintiffs make two arguments in this respect. First, the plaintiffs argue that parole authority only has power to make administrative rules and not broad legislative

policy rules. Second, the plaintiffs argue that even if the parole authority has the power to make broad policy rules, the new regulations conflict with Ohio statutes.

The plaintiffs' first argument is unavailing. The Ohio parole authority is charged with administering all statutes relating to parole, *see* O.R.C. § 2967.02, including determining whether a convict has violated parole. O.R.C. § 2967.15. The parole authority has a long history of making regulations governing parole revocation. It should be noted that the plaintiffs did not contest the authority's power to issue the old regulations; they only challenged the *application* of the old regulations, arguing that a hearing to present mitigating circumstances was not a "meaningful hearing."

Second, plaintiffs argue that the new parole revocation procedures are inconsistent with § 2967.15 of the Ohio Code, which requires that a parolee be given an individual parole revocation hearing when a *parole officer* has begun the parole revocation hearing on his own initiative. This case, however, does not involve a situation in which the parole officer has begun the parole revocation proceedings on his own initiative, or based on his charge or conduct, which has not resulted in a conviction.[8] Instead, this case is governed by a different provision of § 2967.15.

The legislature has *not* specifically required an individual hearing when the basis for the parole revocation is a subsequent conviction. The statute provides only: "A convict who has been conditionally pardoned or a prisoner who has been paroled, and who, in the judgment of the adult parole authority, has violated the condition of his, pardon or

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[8]The parole authority does conduct an individual hearing in these circumstances.

parole shall be declared a violator." O.C.R. § 967.15. Thus, the agency can "declare" a parolee to have been convicted of a subsequent violation while on a parole to be a "violator" either by administrative rule or through an individual hearing. The agency has chosen to address these cases by administrative rule, which is logical as those parolees who have been *convicted* of another felony while on parole have already had a trial or hearing to determine whether they actually committed the offense charged.[9] The agency has also concluded, by administrative rule, that no mitigating circumstances would overcome a subsequent conviction of another felony committed while on parole; thus, an individual hearing would be unnecessary. The agency's conclusion is a permissible one, as we have articulated previously in *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir. 1993). We find no merit, therefore, in plaintiffs' contentions in this regard.

B. *Whether this court should reconsider its decision in Sneed v. Donahue.*

Alternatively, plaintiffs ask us to reconsider our decision in *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir. 1993), in which we upheld the constitutionality of the Kentucky Parole statutes that eliminated any hearing on parole violation if the parolee was convicted of a new felony while on parole. The Kentucky and proposed Ohio parole revocation statutes are identical in that each statute eliminates agency discretion and directs revocation when a parolee has been convicted of a subsequent violation while on parole.

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[9]Even under the old regulations, the parolee did not receive an individual hearing on every issue, because he was conclusively presumed to be a parole violator if he had been convicted of another felony while on parole. The only issue at the hearing was whether mitigating circumstances warranted leniency in revoking his parole.

We held in *Sneed* that the parolee "had no clearly established right to a parole revocation hearing" once a subsequent parole violation conviction had been established and the law gave the parole agency no authority to consider further mitigating factors.

> The Supreme Court in *Morrissey [v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972)] clearly instructed that the purpose of a final revocation hearing is to give the parolee an opportunity to present facts challenging the determination that he has violated a condition of parole and to present all circumstances surrounding the violation to the parole authority so that it may exercise *its discretion* in a fully informed manner. In this case, however, a revocation hearing would serve no such purposes. It is undisputed that Sneed violated a condition of his parole and has met all the factual predicates required by Ky. Rev. Stat. § 439.352 before that section can be applied to him. In addition, it would be pointless for him to present mitigating circumstances to the Board since the Board has no *discretion* in determining whether to revoke his parole status...

Sneed, 993 F.2d at 1243 (emphasis in original). Our conclusion in *Sneed* is supported by *Black v. Romano*, 471 U.S. 606, 612, 105 S.Ct. 2254, 2258, 85 L.Ed.2d 636 (1985), in which the Supreme Court stated that

> [n]either *Gagnon [v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756] nor *Morrisey* considered a revocation proceeding in which the factfinder was required by law to order incarceration

> upon finding that the defendant had violated a condition of probation or parole. *Instead, those cases involved administrative proceedings in which revocation was at the discretion of the relevant decision maker.* Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the factfinder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation or parole.

Thus, *Black* teaches that *Morrissey* does not require that a parole authority be given discretion regarding when to revoke a parolee's parole status; rather, it simply requires that when such discretion is given, a revocation hearing is required. *Sneed*, 993 F.2d at 1243, 1244.

As pointed out also in *Sneed,* two other court have reached this same result: *United States v. Cornog*, 945 F.d 1504 (11th Cir. 1991); *Pickens v. Butler*, 814 F.2d 237 (5th Cir.),*cert. denied*, 484 U.S. 924 (1987). We have no occasion (or authority) to revisit *Sneed,* and we decline plaintiffs' invitation to do so. Plaintiffs have, accordingly, shown no due process violation by the amended procedure adopted by defendants in Ohio. This procedure would apply to all situations in which a party or parolee was convicted of an offense after September 1, 1992.

C. *Whether the new parole regulations violate the ex post facto clause of the United States Constitution.*

As to the *ex post facto* challenge, we have considered this challenge in two non-binding parole guideline cases: *Persky v. Edwards*, 1986 WL 16754 at *3 (6th Cir.); *Ruip*

v. United States, 555 F.2d 1331, 1335 (6th Cir. 1977). This case, by contrast, involves binding regulations that are mandatory after September 1, 1992, and eliminates any discretion in the parole agency to consider mitigating circumstances. To establish the claimed *ex post facto* violation, plaintiffs must establish that the regulation at issue (1) is retroactive in its application, and (2) "must disadvantage the offender affected by it." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)). *See also Dale v. Haeberline*, 878 F.2d 930, 935 (6th Cir. 1989), *cert. denied*, 494 U.S. 1058 (1990). In this case, the agency action in amending the pertinent regulation has the same effect as legislation for the purpose of *ex post facto* consideration.

The focus in determining whether a new law violates the *ex post facto* clause is the time the offense was committed. *Weaver*, 450 U.S. at 31, 101 S.Ct. at 965. *See also Persky v. Edwards*, 1986 WL 16754 (6th Cir.)(quoting *Forman v. McCall*, 709 f.2d 852, 859 (3d Cir. 1983)). ("[I]t is a fundamental principle of ex post facto jurisprudence that a court entertaining an ex post facto claim must focus upon the law in effect at the time of the offense for which a person is being punished."); *Rodriquez v. United States parole Comm'n*, 594 F.2d 170, 176 (7th Cir. 1979)("[A]lthough parole eligibility is determined as of the date of sentencing for some purposes...the ex post facto clause looks to the punishment annexed at the time the crime was committed.").

Next we look to whether the new regulations are more onerous than the regulations in effect at the time this subclass committed their initial crime. The defendants, relying on *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290 (1977), argue that the change is merely a procedural change, and does not affect the substantive rights of the plaintiff class. *See Dobbert*, 97 S.Ct. at 2298 ("Even though it may

work to the disadvantage of a defendant, a procedural change is not ex post facto."). Although the distinction between substance and procedure might sometimes be elusive, "a change in the law that alters a substantial right can be ex post facto 'even if the statute takes a seemingly procedural form.'" *Miller v. Florida*, 482 U.S. at 433, 107 S.Ct. at 2453. Although the change here involves a procedural matter--the right to a hearing on revocation of parole--it still affects substantive rights attendant to parole revocation. Under the old regulations, parole would be revoked for the full amount of time unless the inmate could convince the parole authority that mitigating circumstances warranted mercy. Under the new procedures, there is no opportunity to present these mitigating circumstances. This procedural change affects *substantive* rights.

Thus, the new regulations may violate the *ex post facto* clause for a portion of the plaintiff class wherein described. The plaintiff class in this case has been denied broadly to include: "all persons whose parole was, or will be revoked by the Ohio Adult Parole Authority through a so-called parole-violator recommissioned hearing because they have been convicted of a new felony committed while on parole." Obviously, the new regulations cannot be deemed to be an *ex post facto* violation as to those inmates whose paroles were revoked after a hearing under the old regulations, because the new parole regulations were not applied to them. Likewise, the statute is not *ex post facto* as to those who committed their "initial crime"[10] after the date of enactment (September 1, 1992). The district court's opinion, however, does not take into account those plaintiffs who committed their initial crime before the new regulations

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[10]We use the term "initial crime" to refer to the crime from which the inmate has been paroled. It does not refer to the subsequent violation while on parole.

came into effect but whose parole revocation proceedings will be governed by the new regulations.[11] The new regulations are retroactive only to these members of this class.[12]

To the extent any plaintiff falls into this designated category, he is entitled under the old regulations to a meaningful hearing as described in *Morrisey v. Brewer*, 408 U.S. 471 (1972). We may only provide prospective injunctive relief in this present case to those inmates, if any, who had committed their initial crime prior to September 1, 1992, and whose parole may be revoked under the new regulations. Only these plaintiffs have a claim to injunctive relief.

IV. *CONCLUSION*

In summary, we AFFIRM the district court in all respects, except as to those prisoners, if any, who committed initial offenses and also a parole violation offense conviction prior to September 1, 1992, but whose parole revocation procedures will be governed by the new regulations. Likewise, we *REMAND* the *ex post facto* claim for the district court to provide prospective injunctive relief as to those limited members of the plaintiff class described in this opinion.

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[11]The district court concluded that the "defendants have not retroactively applied [the new regulations] to the subclass of plaintiffs whose parole had been earlier revoked..."

[12]An oral argument, the Ohio Attorney General's office stated that there had been no such actions taken.

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95 MAR 22 PM 2:46 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,
Plaintiffs,

v. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,
Defendants.

ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit.

Consistent with the mandate of the United States Court of Appeals for the Sixth Circuit, it is hereby ADJUDGED that application of Ohio Administrative Code §5120:1-1-21, to the extent applied to those members of the plaintiff class, if any, who committed initial offenses prior to the effective date of the regulation, *i.e.*, September 1, 1992, but whose parole revocation procedures are conducted after September 1, 1992, constitutes an *ex post facto* law and its application to such persons is hereby ENJOINED. Those class members who committed their initial crime before September 1, 1992, but whose parole revocation proceedings are conducted after September 1, 1992, are entitled to the

pocedural safeguard outlined in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Moss v. Patterson*, 555 F.2d 137 (6th Cir.) *cert. denied, sub nom. Kette v. Moss*, 434 U.S. 873 (1977).

The Clerk shall enter final judgment accordingly.

Sandra S. Beckwith, Judge
United States District Court

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93 OCT 22 PM 12:21 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,

Plaintiffs,

v. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,

Defendants.

OPINION AND ORDER

Plaintiffs, a class of inmates whose parole was revoked by the Ohio Adult Parole Authority ["APA"], brought this action on behalf of themselves and of a class of plaintiffs, for prospective declaratory and injunctive relief pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of plaintiffs' revocation proceedings. On May 27, 1993, this Court granted summary judgment in favor of defendants. *Opinion and Order of May 27, 1993.* Final judgment was entered on May 28, 1993. This matter is now before the Court on plaintiffs' motion to alter or amend that judgment, Rule 59(e), Fed. R. Civ. P., and on plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order denying plaintiffs' Rule 16(f) motion for sanctions against defendants. Rule 72, Fed. R. Civ. P.

The plaintiff class consists of parolees who were convicted of a subsequent felony while on parole, and whose parole was subsequently revoked as a parole violator recommissioned ["PVR"]. Plaintiffs originally claimed that their PVR hearings failed to comport with procedural due process. They asked that the Court declare that defendants' PVR procedures violated plaintiffs' procedural due process rights, *Second Amended Complaint*, and enjoin defendants from following PVR procedures violative of plaintiffs' procedural due process rights. *Id.*

During the course of this litigation, Ohio Administrative Code ["OAC"] §5120:1-1-19(A)(1), the former administrative regulation dealing with PVR procedures, was repealed and OAC §5120:1-1-21 was implemented. After evaluating this new regulation by reference to *Black v. Romano*, 471 U.S. 606 (1985), this Court concluded that OAC §5120:1-21, which divested the Ohio Adult Parole Authority ["APA"] of all discretion regarding the revocation of a PVR's parole, is constitutional. *Opinion and Order of May 27, 1993. See also Sneed v. Donahue*, 993 F.2d 1239, 1243 (6th Cir. 1993). The Court further held that, because the procedures challenged in the second amended complaint were no longer in effect, the case has been rendered moot. *Opinion and Order of May 27, 1993.* Final judgment for defendants was entered on May 28, 1993.

Plaintiffs now seek to amend this Court's judgment, arguing that the application of OAC §5120:1-1-21 to members of the plaintiff class whose parole had been revoked under the old regulation violates the constitutional prohibition

against *ex post facto* laws. *See Article I, Section 10, Untied States Constitution.*[13]

In order to demonstrate a violation of the *ex post facto* clause contained in the United States Constitution, plaintiffs must establish that the law at issue 1) is retroactive in application and 2) "must disadvantage the offender affected by it." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)); *Dale v. Haeberlin*, 878 F.2d 930, 935 (6th Cir. 1989), *cert. denied*, 494 U.S. 1058 (1990). The new regulation has not been applied to remedy any defect in the revocation procedures followed in the past. Accordingly, defendants have not retroactively applied OAC §5120:1-1-21 to the subclass of plaintiffs whose parole had been earlier revoked pursuant to former OAC §5120:1-1-19(A)(1). Defendants cannot, and do not, argue that this subclass of plaintiffs will be subjected to OAC §5120:1-1-21. Accordingly, plaintiffs have failed to establish an *ex post facto* violation in this action.

As this Court ruled in its *Opinion and Order* entered May 27, 1993, the relevant analysis turns to whether or not plaintiffs' claims for relief are moot. Plaintiffs' sole claims for injunctive relief sought to restrain defendants from violating plaintiffs' procedural due process rights in the future through the use of constitutionally infirm PVR hearings or procedures. Plaintiffs no longer have procedural due process rights to a meaningful hearing in connection with PVR parole revocation proceedings in connection with felonies committed after the effective date of the new regulation. Accordingly, the enactment of OAC §5120:1-1-

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[13]The Eleventh Amendment prevents this Court from considering claims under Ohio's Constitution. *See Pennhurst State School and Hospital v. Haldeman*, 465 U.S. 89 (1984).

21 has rendered plaintiffs' claims for future injunctive relief moot.

Plaintiffs assert that their claims or declaratory relief are not rendered moot by the enactment of OAC §5120:1-1-21. This Court disagrees. Where the plaintiffs "seek[] a declaratory judgment as to [the Parole] Board's past actions -- without any substantive relief involved -- neither the Declaratory Judgment Act standard (28 U.S.C. §2201) nor Article III's 'case' or 'controversy' requirement is satisfied." *Jackson v. Illinois Prisoner Review Board*, 657 F.Supp. 823, 827 (N.D. Ill. 1987), *aff'd in part and rev'd in part*, 856 F.2d 890 (7th Cir. 1988) (citing *Green v. Mansour*, 474 U.S. 64 (1985); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). To hold otherwise would constitute "an end run around habeas corpus procedures." *Foster v. Kassulke*, 898 F.2d 1144, 1148 (6th Cir. 1990). Declaratory relief evaluating the constitutionality of past procedures would be the functional equivalent of a habeas corpus action, and is not available in an action under 42 U.S.C. §1983. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973).

Plaintiffs also disagree with this Court's rejection of their argument that defendants "exceeded their rule-making authority" when OAC §5120:1-1-21 was enacted. *Plaintiffs' Motion to Alter or Amend May 28, 1993 Order*, p. 15. This Court expressly held that "OAC §5120:1-1-21 is a valid exercise of rule-making authority and serves to divest individual APA panels of discretion whether or not to revoke a PVR's parole." *Opinion and Order of May 27, 1993*, at 12. Plaintiffs' motion to alter or amend fails to persuade this Court that the judgment of May 28, 1993 was entered in error in this regard.

Finally, plaintiffs object, pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, to Magistrate Judge King's

denial of plaintiffs' Rule 16(f) motion for sanctions against defendants. Notwithstanding plaintiffs' claims to the contrary, this Court concludes that Magistrate Judge King's conclusions that the circumstances in this action do not justify an award of fees or the preclusion of relevant evidence is neither clearly erroneous nor contrary to law. Accordingly, plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order are OVERRULED.

WHEREUPON plaintiffs' motion to alter or amend this Court's judgment of May 28, 1993 is without merit, and it is therefore DENIED. Plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order denying sanctions against defendants are without merit, and they are therefore OVERRULED.

Sandra S. Beckwith, Judge
United States District Court

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93 MAY 27 PM 1:14 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,
Plaintiffs,

v. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,
Defendants.

OPINION AND ORDER

Plaintiffs, inmates whose parole has been revoked by the Ohio Adult Parole Authority ["APA"], bring this action on behalf of themselves and of a class of plaintiffs for prospective declaratory and injunctive relieve pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of their final parole revocation proceedings. This matter is now before the Court on the parties' cross-motions for summary judgment.

The plaintiff class is composed of parolees whose parole has been or will be revoked because they have been convicted of a subsequent felony committed while on parole. Referred to by the APA as Parole Violator Recommissioned

["PVR"], each inmate was provided a final parole revocation hearing. The regulation governing those hearings, Ohio Administrative Code ["OAC"] §5120:1-1-19(A)(1), provided that the subsequent felony conviction creates a conclusive presumption that the inmate has violated his parole, and that the scope of the final revocation hearing would be strictly limited to the issue of mitigation.[14] Plaintiffs claim that their procedural due process rights have been abridged in several respects by the manner in which their PVR hearings were held. Plaintiffs and defendants have filed motions for summary judgment.

Summary judgement is governed by Rule 56 of the Federal Rules of Civil Procedure, which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an

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[14]OAC §5120:1-1-19(A)(1) provides:

> In the event a releasee is convicted and sentenced on a new felony under the Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 [providing that all conditions of parole include a requirement that the parolee abide by all federal, state and local laws] has been violated. In such cases, as applicable, the parole revocation hearing will be confined to the determination of mitigating circumstances.

otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *Kendall v. The Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984).

The standard to be applied by the Court on motion for summary judgment mirrors the standard for a directed verdict.

Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986); *Anderson*, 477 U.S. at 250.

> The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983). In essence, thought, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Id. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Rule 1 of the Federal Rules of Civil Procedure).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence

submitted] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (footnote omitted); *accord*, *Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1455-56 (6th Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985). Inferences to be drawn from the underlying facts contained in such materials must be considered in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Watkins v. Northwestern Ohio Tractor Pullers Association, Inc.*, 630 F.2d 155, 158 (6th Cir. 1980). Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. *Adickes*, 397 U.S. at 157-60; *Smith v. Hudson*, 600 F.2d 60, 65 (6th Cir.), *cert dismissed*, 444 U.S. 986 (1979).

If the moving party meets its burden and if adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 326. The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Anderson*, 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 WALL. 442, 448 (1872)). As is provided in Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for

> trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

Thus, "a party cannot rest on the allegations contained in his...[pleadings] in opposition to a properly supported motion for summary judgment against him." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 259 (footnote omitted).

The process due parolees charged with violating conditions of their parole has changed over time. The United States Supreme Court first held, in *Morrisey v. Brewer*, 408 U.S. 471 (1972), that a parolee's "liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." *Id.*, 408 U.S. at 482.

First, the Supreme Court held, a parolee is entitled to prior notice and a reasonably prompt informal inquiry, conducted by an impartial hearing officer, to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. At this preliminary revocation hearing, the parolee is entitled to present relevant information and to question adverse witnesses unless security considerations indicate otherwise. The neutral hearing officer must summarize the evidence and state the reasons for his decision. *Id.*, 408 U.S. at 484-87.

If probable, or reasonable, cause is found to believe that the parolee has violated one or more conditions of his parole, the parolee is then entitled to a final revocation proceeding before a neutral and detached hearing body. The parolee must have been given written notice of the claimed violations and must be advised of the evidence against him. He may be entitled to counsel and must be afforded an

opportunity to be heard in person and to present witnesses and documentary evidence. He also has the right to confront and examine adverse witnesses unless security considerations militate against this. A written statement of the evidence relied on and reasons for revoking parole must be provided. *id.*, 408 U.S. at 487-90. *See also Gagnon v. Scarpelli*, 411 U.S. 778 (1973) [extending the same due process protections to persons charged with violating conditions of probation].

Thereafter, the United States Court of Appeals for the Sixth Circuit commented that, "The automatic revocation of parole for every parole violation, regardless of the mitigating circumstances, clearly runs counter to the dictates of ... *Morrissey v. Brewer.*" *Preston v. Piggman*, 496 F.2d 270, 275 n.1 (1974). The Court held specifically in *Moss v. Patterson*, 555 F.2d 137 (6th Cir.), *cert. denied sub nom. Kette v. Moss*, 434 U.S. 873 (1977), that a final revocation proceeding consistent with the dictates of *Morrissey v. Brewer* must be afforded even parolees convicted of a subsequent felony.

Plaintiffs in this case challenge the constitutional sufficiency of the final revocation proceedings afforded to PVRs in Ohio under OAC §5120:1-19(A)(1). The evidence currently before the Court indicates that hearings held at the correctional institution before the parole panel pursuant to O.A.C. §5120:1-1-19(A)(1) failed to provide to PRVs notice sufficient to enable them to marshall witnesses or other information for presentation in mitigation. Moreover, PVRs are denied the assistance of counsel and are not permitted to call or to subpoena witnesses to testify on their behalf at the final hearing. Although documentary evidence submitted in mitigation by the PVR will ordinarily be accepted by the parole panel, the panel does not take into account such information in determining whether or not the PRV's parole status should be revoked. Finally, the parole panels exercise

no discretion in whether or not to revoke the PVR's parole. In this regard, the prevailing view among state officials is that parole panels have no discretion to take any action other than revocation of parole until after the minimum term of imprisonment on the new felony conviction has been served.

Defendants contend, first, that the procedures followed under OAC §5120:1-1-19(A)(1) do not contravene any constitutional dictates because PVRs, who are already in custody on the new conviction, do not in fact qualify as parolees. Accordingly, defendants argue, no action taken by parole officials can result in the deprivation of the PVRs' liberty. This argument is specious.

The United States Court of Appeals for the Sixth Circuit has specifically recognized that PVRs in Ohio are entitled to a final revocation hearing consistent with *Morrissey* and *Gagnon*. *Inmates' Councilmatic Voice v. Rogers*, 541 F.2d 633 (6th Cir. 1976). Moreover, *Moody v. Daggett*, 429 U.S. 78 (1976), made clear that a parolee's incarceration on an entirely new charge is not co-extensive with the revocation of his parole. Finally, it is indisputable that the actual result of the final parole revocation hearing is the panel's revocation of the PVR's parole.

Defendants have now, however,substituted OAC §5120:1-1-19 (A)(1) with OAC §5120:1-1-21, which provides, in pertinent part:

> (A) The Adult Parole Authority *shall revoke* the release of any releasee who is recommitted to the Department of Rehabilitation and Correction to serve a sentence imposed upon him by any court in Ohio for an offense he committed while on any release granted by the Adult Parole Authority or while serving a period of intermediate transitional detention

> pursuant to Rule 5120-11-12 of the Administrative Code or serving a period of parole supervision pursuant to Rule 5120-11-19 of the Administrative Code.
>
> (B) This revocation shall be accomplished by the issuance of minutes by the Adult Parole Authority after it has been verified that the sentence was imposed for an offense that occurred while the prisoner was under release status (emphasis added).

Thus, unlike former OAC §5120:1-1-19(A)(1), the currently controlling regulation, OAC §5120-1-1-21, no longer allows the APA any discretion as to whether or not to revoke the parole of a PVR. The revocation is effected simply upon verification by the APA that the PVR has been convicted of another criminal offense committed while on parole, and the declaration of revocation by the APA by means of the "issuance of minutes."

In *Black v. Romano,* 471 U.S. 606 (1985), the United States supreme Court distinguished statutory or regulatory schemes that vested discretion in a parole authority in the revocation process from those that did not:

> [N]either *Gagnon* nor *Morrissey* considered a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition or probation or parole. Instead, those cases involved administrative proceedings in which *revocation was at the discretion of the relevant decisionmaker.* (citations omitted). Thus, the Court's discussion of the importance of the informed

> exercise of discretion *did not amount to a holding that the factfinder in a revocation be granted discretion to continue probation or parole* (emphasis added).

Id., 471 U.S. at 612. As a result, what had been perceived to be an unconditional right to a parole revocation hearing with certain due process safeguards now seems to turn on whether or not discretion is reposed in the factfinder.

All of the judicial authority after *Black v. Romano* has held that, if the decisionmaker retains any discretion in determining whether or not parole should be revoked, the procedural safeguards of *Morrissey* must be followed. On the other hand, if discretion is lacking and the revocation of parole is automatic once the fact of a subsequent conviction is established, a parolee is afforded no further due process safeguards and, indeed, no revocation hearing. *Pickens v. Butler,* 814 F.2d 237, 239 (5th Cir.), *cert. denied*, 484 U.S. 924 (1987); *Alevras v. Neubert*, 727 F.Supp. 852, 853-54 (D.D. N.Y. 1990); *Witzke v. Withrow*, 702 F.Supp. 1338, 1351 (W.D. Mich. 1988). *See also United States v. Cornog*, 945 F.2d 1504, 1512-13 (11th Cir. 1991). The operative question here, then, is whether Ohio currently vests any discretion in the parole panel in determining whether or not a PVR's parole will be revoked. The plaintiff class contends that Ohio law does. Specifically, plaintiff argue that the parole board may effectively continue parole simply "[b]y not verifying the facts or by not issuing the minutes, or by delaying either act, ..." *Plaintiffs' Reply to Defendants' Memorandum Contra Plaintiff Class' Motion for Summary Judgment*, at 12. *See also United States v. Cornog*, 945 F.2d 1504. However, this argument ignores the specific language of OAC §5120:1-1-21(A), which requires that the APA "*shall revoke* the release" of any parolee recommitted to the Ohio Department of Rehabilitation and Correction to

serve a sentence imposed upon him for an offense committed while on parole (emphasis added.)

Plaintiffs also contend that, regardless of OAC §5120-1-21, the APA is vested with discretion by virtue of O.R.C. §2967.17, which provides:

> The adult parole authority may,in its discretion, grant an administrative release:[15]
>
> (A) To a parole violator serving another felony sentence in a penal institution within or without this state for the purpose of consolidation of the records or where justice would be best served;
>
> (B) To a parole violator at large whose case has been inactive for at least ten years following the date of declaration of parole violation.
>
> An administrative release shall not be granted except upon the concurrence of a majority of the parole board and approval of the chief of the adult parole authority and shall not operate to restore the rights and privileges forfeited by conviction as provided in section 2961.01 of the Revised Code. Any person granted an administrative release under this section may subsequently apply for a commutation of sentence for the purpose of regaining the rights and privileges forfeited by conviction.

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[15]"Administrative release" is defined as "a termination of jurisdiction over a particular sentence by the [APA] for administrative convenience." O.R.C. §2967.01 (C).

See State v. Dean, 1986 WL 9071 (Ross Cty. App. 1986) [an Ohio parolee was administratively released from parole following his sentence to life imprisonment in another state]. The statute does not vest any discretion in the APA or its panels in connection with the revocation of a PVR's parole. Accordingly, OAC 15120:1-1-21, which does divest all discretion from the APA in this regard, is not inconsistent with this statute.

Plaintiffs also take the position that OAC 5120:1-1-21 is ineffective because it is inconsistent with Ohio statutory law. In Ohio, an agency "may not issue rules which are unreasonable or are in clear conflict with statutory enactment covering the same subject matter." *Carroll v. Department of Administrative Services*, 10 Ohio App. 3d, 108, 110 (1983). Plaintiffs take the position that OAC §5120:1-1-21, which purports to divest the APA of all discretion where the issue of revocation of PVRs is concerned, is inconsistent with ORC §2967.15, which provides, in pertinent part:

> A convict who has been conditionally pardoned or a prisoner who has been paroled, and who, in the judgment of the adult parole authority, has violated the conditions of his pardon or parole shall be declared a violator. In such case, the time from the date of the declared violation of his pardon or parole to the date he becomes available for return to the institution shall not be counted as a part of time or sentence served.

The Ohio APA is charged with administering all statutes relating parole. O.R.C. §2967.02. Read together, O.R.C. §§2969.02 and .15 reflect the General Assembly's intent to confer upon the APA the authority to determine those circumstances under which a person released on parole

should be declared a violator and returned to the institution from which he was paroled. The statutes do not require that individual members of the APA or that panels of the APA exercise that discretion in each individual case. Accordingly a regulation such as OAC §§5120:1-1-21, which expressly articulates one circumstance under which the APA will revoke a parolee's parole, is not, in the judgment of this Curt, inconsistent with ORC §2967.15.

In short, then, this Court concludes that OAC §§5120:1-1-21 is a valid exercise of rule-making authority and serves to divest individual APA panels of discretion in the decision whether or not to revoke a PVR's parole.

Because, under the new administrative regulation, individual parole panels no longer have discretion with respect to the revocation of the parole of any PVR, the due process protections afforded parolees by *Morrissey v. Brewer* are no longer applicable. *See Pickens v. Butler,* 814 F.2d 237. *See also United States v. Cornog*, 945 F.2d 1504 (11th Cir. 1991); *Black v. Romano*, 471 U.S. 606.

Defendants contend that, with the passage of the new regulation, the issues in this case have been rendered moot. Plaintiffs disagree.

The second amended complaint, filed December 9, 1992, challenges the PVR revocation procedure in place at the time the complaint was filed, alleging specifically that that procedure violated the due process rights of the members of the plaintiff class. Plaintiffs seek declaratory relief declaring that the revocation procedure is unconstitutional by virtue of the facts that that procedure fails to give members of the plaintiff class reasonable and adequate notice of the scheduling of the PVR hearing and of the PVRs' rights at the hearing, fails to provide a meaningful opportunity to present

evidence and argument as to mitigation, and prohibits the exercise of discretion by the members of the Parole Board in light of mitigating factors. *Second Amended Complaint*, at 6. The plaintiffs also seek preliminary and injunctive relief

> restraining, prohibiting, and enjoining Defendants from approving, implementing, or enforcing PVR revocation procedures which deprive Plaintiffs and all others similarly situated of their Fourteenth Amendment due process rights.

Second Amended Complaint, at 7. As this Court stated, in its October 28, 1991 Opinion and Order denying the defendants' motion to dismiss, the plaintiff class in this action seeks only declaratory and future injunctive relief enjoining the defendants from following the challenged procedures. The Court specifically noted that this action did not, and indeed could not, challenge the lawfulness of the current confinement of anymember of plaintiff class, because such an attack is properly brought only in the context of a habeas corpus action under 28 U.S.C. §2241. *See Presiser v. Rodriquez*, 411 U.S. 475 (1973). Because the procedures challenged by the second amended complaint no longer have any force or effect in the State of Ohio, this Court concludes that the issues joined by the second amended complaint and the answer thereto have, by passage of OAR §5120:1-1-21, been rendered moot. Accordingly, defendants are entitled to judgment as a matter of law.[16]

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[16]This determination does not, of course, impact upon the right of any member of the plaintiff class to challenge, in a petition for a writ of habeas corpus, the constitutionality of his current confinement under former procedures.

WHEREUPON plaintiffs' motion for summary judgment is without merit and it is therefore DENIED. The claims asserted in the second amended complaint have been rendered MOOT by the passage of OAR §5120:1-1-21 and, for that reason, the defendants' motion for summary judgment is meritorious and it is therefore GRANTED.

The Clerk is DIRECTED to enter FINAL JUDGMENT for the defendants.

Sandra S. Beckwith, Judge
United States District Court

FILED
92 DEC 9 AM 9:54 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,
Plaintiffs,

v. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,
Defendants.

OPINION AND ORDER

Plaintiffs, inmates whose parole was revoked by the Ohio Adult Parole Authority ["OAPA"], bring this action on behalf of themselves and of a class of plaintiffs. Plaintiffs seek declaratory and injunctive relief, pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of plaintiffs' parole revocation proceedings. This matter is now before the Court on defendants' motion to reconsider this Court's prior Opinion and Order denying their motion for summary judgment. *Opinion and Order of May 12, 1992.*

Rule 54(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> [A]ny order ... which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order ... is subject to revision at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Three of the representative plaintiffs[17] in this class action[18] unsuccessfully sought relief through actions in *mandamus* before the state courts prior to instituting the present action. Defendants argue that the dismissals of the *mandamus* actions serves to preclude §1983 claims asserted by those plaintiffs in this action.

The application of the doctrine of *res judicata* is determined by the effect of the prior judgment, in this case, judgments rendered by Ohio Courts. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985). In its Opinion and Order of May 12, 1992, this Court held that the Ohio Supreme Court would, if confronted with this issue, conclude that the doctrine of *res judicata* does not preclude subsequent litigation when the prior action entails a higher burden of proof. *See In re Young*, 58 Ohio St. 2d 90, 92 (1979); *Reynolds v. Ross County Children's Services Agency*, 5 Ohio St. 3d 27, 30 (1983). In Ohio, an action in *mandamus* requires the petitioner to establish the

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[17]The three representative plaintiffs are: Glenn S. Kellogg, Lani R. Smith and John Stamper.

[18]This Court also certified a class of plaintiffs in this action defined as "all persons whose parole was, or will be, revoked by the Ohio Adult Parole Authority through a ... parole-violator-recommissioned hearing because they have been convicted of a new felony committed while on parole." *Opinion and Order of July 17, 1992*, at 6.

elements of the claim by a standard of clear and convincing evidence, while the burden of proof in a §1983 action is evidence by a preponderance. Review of Ohio authority therefore led this Court to conclude that *res judicata* does not operate to bar plaintiffs' claims in this action.

This Court must, however, follow the precedent provided by the United States Court of Appeals for the Sixth Circuit. In *Childs v. Van Wert County,* Case No. 91-3118 (unpublished), (March 30, 1992),[19] the United States Court of Appeals for the Sixth Circuit held that the denial by the Ohio Supreme Court of a *mandamus* action precludes a federal §1983 action based on the same facts. In reaching its decision, the Court of Appeals borrowed heavily, as did the underlying District Court, from Seventh Circuit authority.[20] The *Childs* panel also cited with approval *Lesher v. Lavrich*, 784 F.2d 193 (6th Cir. 1986).[21] The applicability of *Childs* to this action is clear.

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[19]Although citation to unpublished opinions is disfavored in the Sixth Circuit, *See* Sixth Circuit Rule 24, the similarity of the facts in the unpublished opinion to the instant action is so great that this Court would be remiss if it did not follow this unpublished precedent.

[20]The Sixth Circuit, after quoting *Wozniak v. DuPage County*, 845 F.2d 677 (7th Cir. 1988), held that "[w]e regard the quoted language as a good summary of legal principles that would be no less applicable in Ohio than in Illinois." *Childs v. Van Wert County*, 1992 U.S. App. LEXIS 6297 at 16-17. The Court also cited a District Court opinion interpreting the doctrine of *res judicata* in Michigan. *Id.*, at 17-18 (quoting *Falk v. State Bar of Michigan*, 631 F.Supp. 1515, 1521 (W.D. Mich. 1986)).

[21]*Lesher* spoke generally of Ohio's law of *res judicata*. *Lesher* did not, however, involve a prior action that required a higher burden of proof.

Accordingly, defendants' motion for reconsideration is meritorious, and it is therefore GRANTED. Defendants are entitled to summary judgment as to named plaintiffs Glen S. Kellogg, Lani R. Smith and John Stamper, who have previously sought relief by way of an action in *mandamus* before the Ohio courts. The remaining named plaintiffs who have not availed themselves of an action in *mandamus* before the Ohio courts, Lawrence Dessenberg, Robert Donley, Michael Jones, Michael Karhoff, and Daniel Schreiber, are unaffected, and may continue the instant action.

The Court notes that the second amended complaint, leave to file which was granted on May 12, 1992, has never been filed. The Clerk is DIRECTED to file the tendered second amended complaint forthwith.

Sandra S. Beckwith, Judge
United States District Court

FILED FEB 28 1995
LEONARD GREEN, CLERK

NO 93-4287

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENN S. KELLOGG; LANI R. SMITH; JOHN STAMPER; LAWRENCE DESSENBERG; ROBERT DONLEY; MICHAEL JONES; MICHAEL KARHOFF; DANIEL SCHREIBER, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

JOHN W. SHOEMAKER, et al.
Defenants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: KEITH, WELLFORD, and DAUGHTREY, Circuit Judges.

ORDER

The parties in this case have called the court's attention to an inconsistency in the body of our opinion filed January 9, 1995, by filing petitions for rehearing. Upon consideration, we shall revise the opinion by striking

therefrom the phrase, "and also a parole violation offense conviction" from the first sentence of "IV. *CONCLUSION,*" p. 12. We shall also strike this phrase from line three of the Judgment in this case entered January 9, 1995. Both petitions for rehearing are DENIED.

No. 93-4287
Kellogg v. Shoemaker

ENTERED BY ORDER OF THE COURT

LEONARD GREEN CLERK